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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

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SUPREME COURT, U.S.

STEVEN KURT WITTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Double Jeopardy Clause bars a court from convicting and sentencing a defendant for an offense solely because the conduct underlying the offense was previously considered in determining the defendant's sentence for a separate crime.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15-28) is reported at 25 F.3d 250. The opinion of the district court (Pet. App. 29-36) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1994. The petition for a writ of certiorari was filed on September 21, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On September 2, 1992, a grand jury in the United States District Court for the Southern District of Texas returned an

indictment charging petitioner with conspiracy to import cocaine, in violation of 21 U.S.C. 963, and attempting to import cocaine, in violation of 21 U.S.C. 952(a). The district court dismissed the indictment on double jeopardy grounds. Pet. App. 29-36. The court of appeals reversed. Id. at 15-28.

1. In August 1989, undercover DEA Agent Roger Norman negotiated with Dennis Mason in Tucson, Arizona, to transport marijuana from Mexico into the United States. The negotiations were unsuccessful, but in June 1990, discussions between Norman and Mason resumed in Houston, Texas. Petitioner and Tom Pokorny joined in those discussions. Petitioner, Pokorny, and Mason eventually planned to import marijuana from Mexico and to import cocaine from Guatemala, with the two deals going on simultaneously. Norman's job was to fly the drugs into the United States. Pet. App. 17; Gov't C.A. Br. 3-4.

In July 1990, the Mexican source for the marijuana indicated that cocaine might be added to the shipment if there were room on the plane or if marijuana were not available. The next month, Norman was told that the Mexican suppliers were ready to ship 4,400 pounds of marijuana. After learning the location of the airstrip, Norman arranged to have the participants arrested in Mexico. On August 12, 1990, Mason and four others were apprehended. Instead of marijuana, 591 kilograms of cocaine were seized. The following day, Norman told petitioner that the pilots had been unable to land in Mexico because the police had arrived at the airstrip. Pet. App. 17; Gov't C.A. Br. 4.

Norman's next contact with petitioner occurred in January 1991, when Norman asked whether petitioner was interested in purchasing 1,000 pounds of marijuana. Petitioner agreed to purchase the marijuana, but he said that he would call Norman the following Monday to tell him whether he could raise the $50,000 downpayment. Three days later, petitioner called Norman from Denver, Colorado, and said that he had the downpayment. Petitioner asked Norman to return a horse trailer that he had used in their earlier activities so that it could be used as a load vehicle for the marijuana. Petitioner stated that he would bring a motor home owned by Sam Kelly to use as a second load vehicle. Pet. App. 17-18; Gov't C.A. Br. 4-5.

On February 7, 1991, petitioner met Norman in Houston. He told Norman that he had come up with only half of the downpayment for the 1,000 pounds of marijuana. Norman agreed to accept the $25,000 downpayment and to allow petitioner three days to obtain the balance. After introducing Norman to Kelly, petitioner showed Norman the motor home and its hidden compartments. While fellow undercover agents took the motor home and trailer to load the marijuana, petitioner, Kelly, and Norman went to petitioner's hotel room to view the money. Shortly afterwards, the vehicles arrived loaded with 1,000 pounds of marijuana. Petitioner and Kelly were arrested when they took possession of the vehicles. Pet. App. 18; Gov't C.A. Br. 5.

2. On March 4, 1991, a grand jury in the United States District Court for the Southern District of Texas returned an

indictment charging petitioner and Kelly with conspiring to possess marijuana with intent to distribute it between January 25 and February 8, 1991, in violation of 21 U.S.C. 846, and possession of marijuana with intent to distribute it on February 8, 1991, in violation of 21 U.S.C. 841(a). On February 21, 1992, pursuant to a plea agreement, petitioner pleaded guilty to the substantive marijuana possession count. Petitioner agreed to cooperate by providing complete and truthful information, and the government agreed to file a motion under Sentencing Guidelines § 5K1.1 if petitioner's cooperation amounted to substantial assistance. The government promised to recommend a three-year cap to the sentence if petitioner helped locate Pokorny. Petitioner did not assist the government in locating Pokorny, but his cooperation led to Kelly's guilty plea. Pet. App. 18; Gov't C.A. Br. 5-6. In addition to dismissing the conspiracy count, the government stipulated that the quantity of marijuana involved in the offense was 375 rather than 1,000 pounds. Pet. App. 18 n.2.

At the sentencing hearing on July 10, 1992, the district court concluded that petitioner's attempt to import marijuana and cocaine in 1990 was part of the same course of conduct as the marijuana offense in 1991 that was charged in the indictment. Accordingly, the court concluded that the marijuana and cocaine involved in the 1990 importation scheme constituted "relevant conduct" under Sentencing Guidelines § 1B1.3 for the purpose of determining petitioner's sentence. After aggregating the quantities of drugs involved in petitioner's 1990 and 1991 activities, petitioner's

base offense level under Sentencing Guidelines § 2D1.1(c)(2) (Drug Quantity Table) was 40.[1] Pet. App. 18 & n.6, 30-31; PSR 3-5, 7-8, 9.

Both the government and petitioner objected to the sentencing court's quantity determination on the ground that plea agreement had stipulated that the quantity of marijuana involved in the offense was 375 pounds. The government also urged the court to accept the parties' position that the attempt to import marijuana and cocaine in 1990 was not part of the same course of conduct as the 1991 marijuana offense to which petitioner pleaded guilty, and that it should therefore not be considered in sentencing. In addition, the government informed the court that it planned to file a separate indictment of petitioner for the 1990 cocaine offenses.[2] Pet. App. 18.

After making offsetting adjustments for an aggravating role in the offense and acceptance of responsibility, the sentencing court

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[1] Based on the presentence report (PSR), the sentencing court found that the total quantity of drugs was equivalent to 232,261.6 kilograms of marijuana. That figure was the sum of (1) the 1,000 pounds (453.6 kilograms) of marijuana involved in the offense to which petitioner pleaded guilty, and (2) the 15 tons (13,608 kilograms) of marijuana that petitioner, Mason, and Pokorny planned to import from Mexico in 1990; the 500 kilograms of cocaine (equivalent to 100,000 kilograms of marijuana) that petitioner, Mason, and Pokorny planned to import from Guatemala in 1991; and the 591 kilograms of cocaine (equivalent to 118,200 kilograms of marijuana) seized when several conspirators were arrested in Mexico on August 12, 1990. Pet. App. 18 & n.6, 30-31; PSR 3-5, 7-8, 9.

[2] The government determined to bring separate indictments for the 1990 and the 1991 events because it did not view the transactions as part of the same course of conduct and because it had not completed investigation of the 1990 cocaine importation scheme at the time of the indictment for the 1991 marijuana offenses. Pet. App. 24 n.43.

concluded that petitioner's Guidelines sentencing range was 292-365 months' imprisonment. The court granted the government's motion for a downward departure under Guidelines § 5K1.1 based on petitioner's substantial assistance, and it departed downward by 148 months to arrive at a sentence of 144 months' imprisonment. Petitioner appealed, but his appeal was dismissed for failure to file a brief. Pet. App. 18-19; Gov't C.A. Br. 6-7.

3. On September 2, 1992, the grand jury returned the indictment in this case charging petitioner and Pokorny with conspiring to import cocaine between August 18, 1989, and August 15, 1990, in violation of 21 U.S.C. 963, and attempting to import cocaine between August 18, 1989, and August 15, 1990, in violation of 21 U.S.C. 952(a). Petitioner moved to dismiss the indictment on the ground that he had already been punished for the cocaine offenses because the quantities of cocaine were included as relevant conduct in the determination of his sentence for the 1991 marijuana offense to which he pleaded guilty. Pet. App. 19; Gov't C.A. Br. 7.

The district court dismissed the indictment on double jeopardy grounds. Pet. App. 29-36. Relying on United States v. Koonce, 945 F.2d 1145 (10th Cir. 1991), cert. denied, 112 S. Ct. 1695 and 112 S. Ct. 1705 (1992), the court ruled that "the government cannot be permitted to craft or develop a scheme by which a person may be twice punished." Pet. App. 35. It also noted its approval of the sentencing court's determination that the marijuana offense and cocaine importation activities involved "one common scheme or plan." Id. at 36. The court therefore concluded that the

indictment was barred by the Double Jeopardy Clause "because it seeks to punish a second time conduct already punished." Ibid.

4. The court of appeals reversed, rejecting petitioner's claim that this prosecution would violate the Double Jeopardy Clause's prohibition against multiple punishments for the same offense. Pet. App. 15-28. Relying on Williams v. Oklahoma, 358 U.S. 576 (1959), the court held that "the use of relevant conduct to increase the punishment of a charged offense does not punish the offender for the relevant conduct." Pet. App. 23. Accordingly, even though petitioner's 1990 cocaine activities were considered as relevant conduct in determining his sentence for the 1991 marijuana offense, the court concluded that petitioner had not been punished for his cocaine activities in that prosecution, and the Double Jeopardy Clause therefore did not bar the later prosecution and punishment of petitioner for the cocaine offenses. Id. at 22-23. The court disagreed with holdings in United States v. Koonce, supra, and United States v. McCormick, 992 F.2d 437 (2d Cir. 1993), that when a defendant's actions are included as relevant conduct in determining the punishment under the Sentencing Guidelines for one offense, those actions may not later form the basis of a second indictment without violating the Double Jeopardy Clause. Pet. App. 19-26.

Even if the inclusion of the cocaine activities as relevant conduct in the determination of petitioner's sentence for the marijuana offense constituted punishment, the court of appeals concluded that Congress intended petitioner to be subject to

multiple punishments for the cocaine offenses. Pet. App. 23-26. The court observed that Guidelines § 5G1.3 contemplates that related offenses will sometimes result in multiple prosecutions and that the provision indicates an intent that the cumulative punishment in separate prosecutions should not exceed "that which would have resulted from prosecution and conviction on both counts in a single proceeding." Id. at 25. The court concluded that because two concurrent sentences are authorized by Congress in a case such as this one, the punishment imposed in the second prosecution does not violate the Double Jeopardy Clause. Id. at 26.[3]

DISCUSSION

Petitioner contends (Pet. 8-13) that the Double Jeopardy Clause bars prosecution and punishment of a defendant for criminal conduct that has previously been taken into account as relevant conduct under the Sentencing Guidelines in determining his sentence for another offense. He relies (Pet. 8) on the protection afforded by the Double Jeopardy Clause against multiple punishments for the same offense. See North Carolina v. Pearce, 395 U.S. 711, 717 (1969); Pet. App. 19. In our view, the court of appeals properly rejected petitioner's contention. Because the courts of appeals

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[3] The court of appeals rejected petitioner's claim that a concurrent sentence for the second offense could not exceed the sentence for the first offense when the first sentence resulted from a downward departure from the Guidelines sentencing range based on a substantial assistance motion under Guidelines § 5K1.1. Pet. App. 26. The court also rejected petitioner's claim that the indictment should be dismissed on the theory that the government had breached its plea agreement. Id. at 27-28. Petitioner does not renew either of those claims in this Court.

are divided on the question, however, and because its resolution significantly affects courts' sentencing authority when the government brings multiple prosecutions against a defendant for related crimes, we agree that the question presented warrants this Court's review.

1. Petitioner argues that the consideration of his 1990 scheme to import cocaine in sentencing him for his 1991 marijuana offense constituted punishment for his cocaine importation scheme, and that he therefore could not be punished for the cocaine importation scheme in this prosecution. It is well established, however, that a sentencing court may conduct a broad inquiry into a defendant's background and criminal history in establishing an appropriate sentence for the offense of conviction. Nichols v. United v. United States, 114 S. Ct. 1921, 1927-1928 (1994); Wisconsin v. Mitchell, 113 S. Ct. 2194, 2199 (1993). When a court takes such other conduct into account in sentencing, the defendant is not "punished" for that other conduct; rather, the only offense for which the defendant receives punishment within the meaning of the Double Jeopardy Clause is the offense of which the defendant was convicted. See Williams v. Oklahoma, 358 U.S. 576, 585-586 (1959).

In Williams, a defendant, after being sentenced to life imprisonment for murder, was separately charged with the kidnaping that led to his victim's death. In imposing a death sentence for that kidnaping, the sentencing court expressly relied on the previously prosecuted murder. 358 U.S. at 581. This Court held

that no double jeopardy violation had occurred, explaining that "in view of the obvious fact that, under the law of Oklahoma, kidnaping is a separate crime, entirely distinct from the crime of murder, the court's consideration of the murder as a circumstance involved in the kidnaping crime cannot be said to have resulted in punishing [defendant] a second time for the same offense." Id. at 586. Williams makes clear that a court does not punish an offender for uncharged conduct when it takes that conduct into account at sentencing. There is, therefore, no double jeopardy bar to a subsequent prosecution based on conduct that was previously considered in sentencing for a separate offense.

If a defendant were "punished" for uncharged conduct within the meaning of the Double Jeopardy Clause whenever a court considered that conduct in setting a sentence for the offense of conviction, recidivist statutes would inflict impermissible multiple punishment. This Court, however, has repeatedly held that recidivist statutes do not infringe the Double Jeopardy Clause or constitute a second punishment for the prior offense. See Spencer v. Texas, 384 U.S. 554, 560 (1967); Gryger v. Burke, 334 U.S. 728, 732 (1948); Graham v. West Virginia, 224 U.S. 616 (1912); McDonald v. Massachusetts, 180 U.S. 311, 313 (1901); Moore v. Missouri, 159 U.S. 673, 678 (1895); cf. Schiro v. Farley, 114 S. Ct. 783, 789-790 (1994) (acquitted conduct may be considered as an aggravating factor in a capital sentencing proceeding for a separate offense without violating the Double Jeopardy Clause's prohibition against multiple prosecutions). The same principle applies under the

Sentencing Guidelines. A court does not "punish" a defendant in the sense required to invoke the Double Jeopardy Clause by considering uncharged activities of a defendant as "relevant conduct" in establishing a sentence for the offense of conviction. The Constitution therefore does not forbid subsequent punishment of the defendant for that relevant conduct when it is charged in a subsequent prosecution.[4]

2. As petitioner notes, the courts of appeals are divided on the question presented in this case. Like the Fifth Circuit in this case, the Seventh Circuit has concluded that the Double Jeopardy Clause does not bar prosecution and punishment of a defendant for criminal conduct that has previously been taken into account under the Sentencing Guidelines in determining his sentence for a prior related offense. See United States v. Brown, 31 F.3d 484, 494-496 (7th Cir. 1994); United States v. Duatre, 28 F.3d 47, 48 (7th Cir. 1994). On the other hand, the courts in United States v. McCormick, 992 F.2d 437 (2d Cir. 1993), and United States v. Koonce, 945 F.2d 1145 (10th Cir. 1991), cert. denied, 112 S. Ct. 1695 and 112 S. Ct. 1705 (1992), have reached a contrary conclu-

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[4] There are often valid reasons why related crimes committed by a defendant are not prosecuted in the same proceeding. In some cases, venue for all of the crimes does not lie in the same district. Even when all of the charges may be brought in the same district, investigation of some of them may not be complete at the time the defendant was apprehended -- as was the case here. Pet. App. 24 n.43. Because this Court has consistently rejected the view that the Double Jeopardy Clause requires that all crimes that are part of the same transaction must be prosecuted in the same proceeding, see, e.g., United States v. Dixon, 113 S. Ct. 2849, 2863 n.14 (1993), the prosecution of related offenses in separate proceedings does not in itself raise any issue under the Double Jeopardy Clause.

sion. In McCormick and Koonce, uncharged criminal conduct was considered in determining the defendant's offense level under the Sentencing Guidelines for the offense of conviction. The government then sought to prosecute the defendant for that criminal conduct. The Second and Tenth Circuits, however, held that the prosecutions were barred by the Double Jeopardy Clause. That holding, as the court of appeals here recognized, conflicts with the result in this case. Pet. App. 254-262; see also United States v. Duatre, 28 F.3d at 48 (rejecting analysis in McCormick and Koonce).

Both the Second and Tenth Circuits reasoned that a defendant in petitioner's position would experience multiple punishment and that the intent of Congress, as expressed in the Sentencing Guidelines, was not "to allow a defendant to be prosecuted for conduct already used to enhance his or her offense level." McCormick, 992 F.2d at 440-441; Koonce, 945 F.2d at 1150-1152. The court of appeals in this case correctly rejected that analysis. Pet. App. 259-261. As its accompanying commentary indicates, Sentencing Guidelines § 5G1.3(b) "clearly permits a defendant to be prosecuted -- and sentenced -- in more than one federal proceeding for different criminal offenses that were part of the same course of conduct." Pet. App. 25 (emphasis omitted); see Sentencing Guidelines § 5G1.3, Application Note 2 (Guidelines § 5G1.3(b) addresses cases in which "a defendant is prosecuted * * * in two or more federal jurisdictions, for the same criminal conduct or for different criminal transactions that were part of the same course

of conduct"). Section 5G1.3(b) address such cases by indicating that the combined period of imprisonment resulting from multiple prosecutions for related crimes should not ordinarily exceed the term that would have resulted from a single prosecution. That approach, which relies on the power of the court to provide for concurrent sentences, is quite different from the view that a second prosecution should be foreclosed altogether.

The government sought review of the decision in Koonce, but the Court denied certiorari. 112 S. Ct. 1705 (1992). At the time of the decision in Koonce, no other court of appeals had considered the double jeopardy consequences of prosecution and punishment for conduct that was previously considered in determining a defendant's offense level under the Sentencing Guidelines. 945 F.2d at 1152-1153. It remains our view that the Sentencing Guidelines context is not different for double jeopardy purposes from the pre-Guidelines context. If the Double Jeopardy Clause is not violated by punishment for conduct that was considered at sentencing in an earlier case, it cannot be significant whether the consideration was totally unguided, as it was in pre-Guidelines cases,[5] or was used to make adjustments of base offense levels under the

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[5] See, e.g., Sekou v. Blackburn, 796 F.2d 108, 111 (5th Cir. 1986) ("Consideration of criminal conduct as an aggravating circumstance does not convert the sentencing proceeding into a trial, conviction, or punishment for the criminal activity so considered.").

Guidelines,[6] or was used to determine where to fix the defendant's sentence within a particular Guidelines range.[7]

In any event, like Koonce and McCormick, this case involves a subsequent prosecution for criminal conduct that was considered in determining a defendant's offense level under the Guidelines for a prior related offense. In light of the clear conflict that has developed among the courts of appeals on the application of the Double Jeopardy Clause to that sequence of events, this Court's review is warranted.

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[6] See, e.g., United States v. Carey, 943 F.2d 44, 46 n.4 (11th Cir. 1991) ("Enhancement of a sentence based on criminal conduct other than that underlying the instant conviction * * * is not considered 'punishment' for that conduct in the double jeopardy context because the court is sentencing the defendant only for the instant offense."), cert. denied, 112 S. Ct. 1676 (1992); United States v. Williams, 935 F.2d 1531, 1538 (8th Cir. 1991) ("Although the court in the [earlier] case inquired into the [later] offense during the sentencing hearing, at no time was Williams put 'in jeopardy' for the [later] offense until the actual trial for the [later] offense."), cert. denied, 112 S. Ct. 1189 (1992).

[7] See, e.g., United States v. Mack, 938 F.2d 678, 679 (6th Cir. 1991) (the prohibition against double jeopardy "is not implicated when a defendant is indicted for an incident of conduct previously used to increase the length of his sentence for a separate offense").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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